

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2080

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 77-2080

FRANCISCO SOLIMEME,
Appellant

v.

UNITED STATES,
Appellee

On Appeal from the United States District Court
for the Eastern District of New York
Brooklyn Division

BRIEF OF APPELLANT



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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii.
PRELIMINARY STATEMENT	1
ISSUE PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE:	
A. Nature, Course and Disposition Below	3
B. Statement of Facts	3
ARGUMENT: APPELLANT ESTABLISHED A SUFFICIENT BASIS FOR THE ALLEGATIONS IN HIS 28 U.S.C. §2255 PETITION TO ENTITLE HIM TO A HEARING AND AN OPPORTUNITY TO PROVE THEM.	7
CONCLUSION	19
AFFIDAVIT OF SERVICE	20

TABLE OF AUTHORITIES

<u>Cases</u>	Page
<u>Allison v. Blackledge</u> , 533 F.2d 894 (4th Cir. 1976)	11
<u>Blackledge v. Allison</u> , -- U.S. --, 52 L.Ed.2d 136 (1977)	9, 11, 12
<u>Giglio v. United States</u> , 405 U.S. 150 (1972)	14, 17
<u>Montgomery v. United States</u> , 499 F.2d 148 (5th Cir. 1972)	9
<u>Napue v. Illinois</u> , 360 U.S. 264 (1959)	14
<u>Reagor v. United States</u> , 488 F.2d 515 (5th Cir. 1973)	18
<u>Teague v. United States</u> , 499 F.2d 1381 (7th Cir. 1974)	18
<u>Taylor v. United States</u> , 487 F.2d 307 (2nd Cir. 1973)	8
<u>United States v. Agurs</u> , 427 U.S. 97 (1976)	13, 14
<u>United States v. Boyce</u> , 472 F.2d 1404 (2nd Cir. 1973), cert. denied, 414 U.S. 819 (1973)	4
<u>Waley v. Johnston</u> , 316 U.S. 101 (1942)	8
<u>Walker v. Johnston</u> , 312 U.S. 275 (1941)	8

Statutory Material

Title 28 United States Code §2255	7
Rules Governing Section 2255 Proceedings	3, 12

IN THE
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FRANCISCO SOLIMENE,

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v.

UNITED STATES,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
BROOKLYN DIVISION

PRELIMINARY STATEMENT

Pursuant to Rule 28(2) of the Local Rules for the
United States Court of Appeals for the Second Circuit, Appellant
states that the decision here appealed from was rendered by Chief
Judge Jacob Mishler, United States District Court for the Eastern

District of New York. To Appellant's knowledge, the Memorandum of Decision and Order, dated May 18, 1977, has not yet been reported.

ISSUE PRESENTED FOR
REVIEW

Did the District Court err in denying Appellant a hearing on his \$2255 Petition and in dismissing said Petition without affording Appellant an opportunity to prove the allegations contained therein?

STATEMENT OF THE CASE

A. Nature, Course and Disposition Below.

On January 28, 1977, Appellant FRANCISCO SOLIMENE (hereinafter referred to as SOLIMENE) filed a Motion to Vacate Sentence Pursuant to 28 U.S.C. §2255 in the United States District Court for the Eastern District of New York, Brooklyn Division. The federal sentence in question was imposed in that Court by the late Honorable George Rosling, United States District Judge, on May 19, 1972. The §2255 Motion was referred to Chief Judge Jacob Mishler who, on March 17, 1977, ordered the United States Attorney to respond thereto.

The United States filed its Answer on April 29, 1977, asking that the Motion be dismissed without a hearing. SOLIMENE filed a reply on May 16, 1977 requesting that the Motion be disposed of at a hearing, and/or that SOLIMENE be allowed to engage in discovery pursuant to Rule 6, Rules Governing Section 2255 Proceedings, 28 U.S.C. §2255 foll.

On May 18, 1977 the District Court dismissed SOLIMENE'S Motion without a hearing. This Appeal followed, with a Notice of Appeal being filed in the United States District Court on June 5, 1977.

B. Statement of Facts.

SOLIMENE was convicted on May 19, 1972, after a jury trial, of conspiracy to smuggle and distribute heroin. He was

sentenced to a 15 year term of imprisonment to be followed by 15 years of special parole. On direct appeal, the conviction was affirmed without opinion in this Court and certiorari was denied by the United States Supreme Court. 472 F.2d 1404 (2nd Cir. 1973); cert. denied, 414 U.S. 819 (1973).

As the District Court noted below, "[t]he chief witness at Petitioner's trial was [an individual named] Ruben Americo Altamirano." App., at 26. The testimony of Altamirano was, in fact, the only evidence linking SOLIMENE to a scheme involving the importation of heroin into the United States from South America. Following Altamirano's testimony, defense counsel requested the United States to supply any and all information concerning his criminal record, specifically directing the inquiry to a possible record in Argentina and/or Uruguay. Tr. 527-529.

The United States responded that Altamirano had no criminal record. Tr. 529. It was further represented that his finger prints had been sent to South America and that the Argentine police responded by cable stating that he had no criminal record. Defense counsel later cross-examined Altamirano on the subject and he denied having any criminal record in Argentina. Tr. 617.

SOLIMENE'S incarceration and his lack of funds severely limited his ability to further investigate the possibility that Altamirano had a criminal record in Argentina. After numerous requests, he finally received a response from the Argentine government on November 25, 1975. That response, and an English translation thereof was attached to the §2255 Motion as Exhibit "A". App. 7-8. The document, a certificate from the Argentine national

Court of First Instance of Criminal Proceedings, states that Altamirano has a record of criminal convictions and that he has been wanted by Argentine authorities on other outstanding charges since August 28, 1968. App. 7-8.

In response to SOLIMENE'S §2255 Petition, the United States filed a return and attached Affidavits of George G. Bashian, the prosecutor in SOLIMENE'S trial, and William McMullen, the customs agent who investigated Altamirano's criminal record. App.18-21. Both official's stated in their respective Affidavits that they neither saw nor knew of the existence of any F.B.I. or Customs Service document establishing Altamirano's criminal record. Neither official, however, denies having seen a document from any other government establishing such a record. In fact, the fact that their denials specifically limited to F.B.I. or Customs Service documents, implies that they have seen other documents establishing his record. In addition, Agent McMullen states that he made appropriate inquiries and that the Argentine police responded that Altamirano had no record. The United States did not, however, submit copies of either the request or the alleged response of the Argentine police.

SOLIMENE'S §2255 Motion also alleged that Altamirano's testimony was influenced by an undisclosed agreement with the United States that Altamirano not be surrendered to Argentine authorities to face the charges which have been outstanding against him since 1968. This allegation was supported by the document from Argentine authorities which stated that Altamirano is still wanted on those charges. App. 7-8. Beyond a formal denial to the paragraphs of SOLIMENE'S Motion which contained these allegations, the

United States has not responded further. Neither of the Affidavits tendered by the United States touched upon this point and the government has offered no explanation of Altamirano's present whereabouts or whether any requests have been received for him from Argentine authorities.

In his reply, SOLIMENE requested that he be allowed to inquire into the above matters further in order to resolve the questions which were either raised or left unanswered by the government's response. Further inquiry, either by way of a hearing or by way of a discovery, was denied, and SOLIMENE'S Petition was dismissed summarily by the District Court.

ARGUMENT

APPELLANT ESTABLISHED A SUFFICIENT BASIS FOR THE ALLEGATIONS IN HIS 28 U.S.C. §2255 PETITION TO ENTITLE HIM TO A HEARING AND AN OPPORTUNITY TO PROVE THEM.

SOLIMENE does not, by this Appeal, attempt to argue the merits of his §2255 Motion, nor does he seek to establish that he is entitled to ultimate relief thereon. All SOLIMENE seeks is an opportunity to prove his case, either by way of a hearing and/or by way of discovery pursuant to Rule 6 of the Rules Governing Section 2255 Proceedings.

The starting point for delineating Appellant's right to a hearing is, of course, the statute itself, which states as follows:

"Unless the Motion and the files and records in the case conclusively show that the prisoner is entitled to no relief, the Court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. §2255 (emphasis added).

The above quoted language in the statute demonstrates that a hearing is required except in those rare

circumstances where "the files and records of the case conclusively show that the prisoner is entitled to no relief." In the face of the sworn allegations in SOLIMENE'S Petition and the documentary evidency appended thereto, it is clear that the files and records of this do not "conclusively" show that SOLIMENE is entitled to no relief.

It is true that SOLIMENE'S sworn statements are opposed by Affidavits submitted by the United States. It is well established, however, that the government's Affidavits cannot defeat Appellant's right to a hearing. This principle was stated as axiomatic by this Court in Taylor v. United States, 487 F.2d 307 (2nd Cir. 1973):

"An opposing Affidavit by the government is not part of 'the files and records of the case' which can be taken to 'conclusively show that the prisoner is entitled to no relief,' within 28 U.S.C. §2255."

487 F.2d, at 308.

As this Court noted in Taylor, supra, this principle was established by the United States Supreme Court in Walker v. Johnston, 312 U.S. 275 (1941) and in Waley v. Johnston 316 U.S. 101 (1942).

The above principles of law merely establish the obvious principle-that conflicting sworn statements present an issue of triable fact necessitating an evidentiary hearing.

As the Fifth Circuit Court of Appeals recently stated in Montgomery v. United States, 469 F.2d 148 (5th Cir. 1972):

"[C]ontested fact issues in §2255 cases must be decided on the basis of an evidentiary hearing, not Affidavits. Brown v. United States, 462 F.2d 681 (5th Cir. 1972); accord, Powers v. United States, 446 F.2d 22 (5th Cir. 1971); Martin v. United States, 447 F.2d 985 (5th Cir. 1971)." 469 F.2d, at 150.

In denying SOLIMENE a hearing on the issue of whether the government knowingly used perjured testimony in obtaining his conviction, the District Court does concede that "ordinarily, Petitioner would be entitled to an opportunity to prove his contentions." App. 31. But the Court goes on to state that, in order to obtain a hearing, SOLIMENE must provide "at least some support" for his allegations. The District Court then goes on to erroneously observe that no Affidavits or documentary evidence are offered to support the claim, and SOLIMENE is therefore not entitled to a hearing. In support of this resolution of the case, the Court cites Blackledge v. Allison, -U.S.-, 52 L.Ed. 2d 136 (1977).

In the first place, this case presents more than a mere "unsupported charge of perjury." Notwithstanding the District Court's erroneous observation that no documentary evidence was submitted in support, SOLIMENE has submitted a document obtained from the Clerk of the Argentine National Court

of Criminal Proceedings. The document, at least on its face, establishes that Altamirano did have a criminal record, contrary to his sworn testimony at SOLIMENE'S Trial. More importantly, it shows that this criminal record, predated SOLIMENE'S Trial and that it must therefore have surely come to the attention of the United States during the course of the inquiries which Agent McMullen alleges he made.

It is true that the document submitted does not conclusively establish Petitioner's allegation of perjury on the part of Altamirano. But SOLIMENE does not contend that it goes this far, but only that it offers sufficient support for his allegations to entitle him to a hearing.

The District Court was apparently concerned over why this evidence did not come to light until 5 years after the Trial. Beyond noting the obvious fact that an incarcerated person of limited financial means encounters great and time consuming difficulty in obtaining documents from foreign governments, SOLIMENE would point out that the delay does not detract from the validity of his claim. Indeed, SOLIMENE has overcome the hurdles of incarceration and limited funds to obtain documentation for Altamirano's criminal record. If the record came so easily to his attention, it must surely have come to the attention of the government.

SOLIMENE has submitted the only documentation he has been able to obtain in 5 years of effort, and this documentation tends to establish his allegations. In response, the government merely states that appropriate inquiries were made at the time of the trial and that Argentine authorities reported that Altamirano

had no criminal record. The government response does not, however, submit or offer to submit copies of the requests allegedly made or the response allegedly received. Nor does it explain why SOLIMENE obtained an affirmative response to his request while the government supposedly obtained a negative one.

Further, the case relied upon by the District Court on this point, Blackledge v. Allison, supra, does not support the action taken here. To the contrary, the United States Supreme Court found that the summary dismissal of a habeas corpus action in that case was improper and it pointed out the importance of allowing such petitioners an opportunity to prove their claims. The prisoner in that case was serving a state sentence as a result of having plead guilty to a single count of attempted safe robbery. In his habeas corpus petition, Allison alleged that his plea was entered in reliance upon a bargain that he would get no more than 10 years and that his 17 year sentence was therefore subject to collateral attack as violative of his plea bargain.

In support of his Petition, Allison swore that the plea agreement was entered into despite the fact that the State Court record tended to refute his claim in this regard. The District Court dismissed his Petition without a hearing and the Fourth Circuit Court of Appeals reversed and remanded the case for an evidentiary hearing. Allison v. Blackledge, 533 F.2d 894 (4th Cir. 1976).

The United States Supreme Court affirmed, agreeing that the Petition should not have been summarily dismissed. More importantly, the Court noted that the test is whether a petitioner's

allegations, when viewed against the record, are:

"So 'palpably incredible,' *ibid.*, so
'patently frivolous or false,' *Pennsyl-*
vania ex rel. Herman v. Claudy, 350
U.S. 116, 119, 100 L Ed 126, 76 S Ct
223, as to warrant summary dismissal."
52 L. Ed.2d, at 148.

In addition, the Supreme Court noted that summary dismissal is even more inappropriate since the new rules authorize a variety of measures to resolve disputes without the necessity of a full evidentiary hearing. The Supreme Court noted that the discovery authorized by Rule 6 and/or the expansion of the record authorized by Rule 7 might allow for the disposition of certain claims without the necessity of a full hearing. In this case, SOLIMENE does not contend at this point that he is necessarily entitled to a full evidentiary hearing. All that is argued on this Appeal is that summary dismissal was inappropriate. If the summary dismissal is set aside, certain of the issues raised by SOLIMENE'S Petition might well be resolved by interrogatories and/or notices to produce submitted to the United States pursuant to Rule 6. All SOLIMENE request is what the Supreme Court afforded the Petitioner in Blackledge v. Allison, *supra*, an opportunity to prove his allegations in some manner. SOLIMENE is entitled to at least this

much since his claims are not so "palpably incredible" or so "patently frivolous or false" as to justify summary dismissal.

As a further ground for summary dismissal of SOLIMENE'S petition, the District Court held that Altamirano's criminal record lacked significant probative value to justify a new trial, even assuming the government knew of his record at the time of trial. App. 10. In support of this position, the District Court relies upon United States v. Agurs, 427 U.S. 97 (1976). The Agurs decision, however, specifically states that it is not applicable in cases (such as SOLIMENE'S) where the "prosecution's case includes perjured testimony and the prosecution knew, or should have known, of the perjury." 427 U.S., at 103.

The Agurs decision reaffirms that the standard in cases involving knowing use of perjured testimony is that any conviction obtained thereby is:

"fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S., at 103 (emphasis added).

The Court then goes on to cite six different cases in which it had enunciated this standard. Id., at n. 8. The Court then holds that this "strict standard of materiality" was not applicable in that case since there was neither prosecutorial misconduct nor any perjured testimony. In this regard, the

Court stated as follows:

"Since this case involves no misconduct, and since there is no reason to question any of the prosecution witnesses' veracity, the [strict] standard of materiality followed in the Mooney line of cases is not necessarily applicable." 427 U.S., at 104.

The instant case, however, does involve the precise facts calling for the strict standard. See, e.g., Giglio v. United States, 405 U.S. 150 (1972) and Napue v. Illinois, 360 U.S. 264 (1959). The District Court thus applied the wrong standard in holding that Altamirano's criminal record lacked sufficient probative value. The correct test, as Agurs reaffirms, is whether there is "any reasonable likelihood" that the false testimony "could" have affected the jury's judgment.

The District Court notes that Altamirano admitted a great deal of criminal activity when he testified at trial. The Court thus surmises that his admission of a prior criminal record would have detracted little from his already soiled character. Whether or not this is true, it cannot be said that there is not any reasonable likelihood that it could have affected the jury's judgment. As has been noted, Altamirano presented the only evidence in the trial linking SOLIMENE to

the alleged conspiracy. Altamirano was a co-conspirator and his testimony was thus already suspect on that point alone. The only crimes he admitted on the stand were those necessarily connected with his involvement in the conspiracy. He admitted that he had been convicted of the conspiracy (Tr. 237-238), that he was in the drug trade (Tr. 433-436) and that he did not pay taxes on the drugs he traded (Tr. 622-623). But those crimes were all implicit in the fact that he testified as an admitted co-conspirator, and the jury might well have concluded that he was a basically honest person who got caught up in the drug trade and committed all the attendant crimes.

The jury might well have been swayed to disbelieve Altamirano had they known that this was not his first brush with the law, and that he had a prior criminal record before he even came to this country. Additionally, the jury might have been swayed if they had known that he had a criminal record and that he perjured himself by denying it on the stand. His commission of perjury on this point before their very eyes might well convince the jury that the rest of his testimony was not worthy of belief. At the very least, it cannot be said that there is not any reasonable likelihood that it could have affected the jury's judgment. Since this is the appropriate test, as reaffirmed by Agurs, supra, and since the District Court applied the wrong test in finding the evidence lacked probative value, its findings in this regard must be rejected.

As to whether Altamirano testified pursuant to an undisclosed agreement with the United States not to turn him over to Argentine authorities, SOLIMENE submits that he has clearly set forth enough verification to avoid a summary dismissal. Again, he does not, by this appeal, seek to argue the merits of this claim; he only seeks the opportunity to prove his allegations without their summary dismissal.

The document appended to SOLIMENE'S petition states that Altamirano, in addition to his prior record, has been wanted by Argentine authorities since 1968. Since he was in the custody of the United States in 1972, he would presumably have been surrendered to Argentina following his sentence here in the absence of any agreement to the contrary. Since SOLIMENE, an incarcerated private citizen, was able to obtain documentation that Altamirano was wanted, the United States must surely have obtained the same knowledge if the inquiries were made as alleged.

In response to the contention of an undisclosed agreement and the documentation which tends to support the claim, the United States offers nothing to rebut it. At the very least, SOLIMENE should be allowed to inquire on the matter by way of interrogatories or other methods of discovery pursuant to Rule 6. None of the affidavits submitted by the United States thus far deny the existence of such an agreement nor do they offer any explanation as to Altamirano's present whereabouts. With so many unanswered

questions, summary dismissal of the petition was clearly inappropriate. SOLIMENE should have the opportunity to prove these claims which were not denied in either government affidavit and which have at least prima facie validity on the basis of the documentation submitted. If the claims are unfounded, they should be denied on the merits after SOLIMENE has been afforded an opportunity, by discovery or by a hearing, to prove them.

If there was an undisclosed agreement with Altamirano, it is clear that due process would entitle SOLIMENE to a new trial. Giglio v. United States, 405 U.S. 150 (1972). The United States Supreme Court so held in Giglio where the government failed to disclose its promise to a co-conspirator whose testimony was the backbone of the case against the petitioner. As the Court stated in that case:

"Taliento's credibility as a witness was therefore an important issue in the case and evidence of any understanding as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

"For these reasons, the due process requirements enunciated in Napue and the

other cases cited earlier require a new trial" 405 U.S., at 154-155.

A situation similar to the one at bar arose in Reagor v. United States, 488 F.2d 515 (5th Cir. 1973). The petitioner there filed a §2255 motion alleging that the government had failed to inform the trial court of promises made to the co-conspirator who testified against petitioner. The §2255 petition was dismissed without a hearing, and the Court of Appeals reversed. The Court of Appeals expressly noted that the petitioner had not established his claims, but it held that he was entitled to an opportunity to do so and that the summary dismissal was thus in error. The Court noted that the contentions, if proved by hearing or otherwise, would clearly entitle petitioner to a new trial pursuant to Giglio, supra. It also noted that the co-conspirator's testimony was highly instrumental in petitioner's conviction.

It cannot be denied that Altalirano's testimony was at least highly instrumental in SOLIMENE'S conviction. Indeed, it was crucial. Thus, all SOLIMENE seeks is an opportunity to prove his allegations which the government affidavits do not deny and which possess sufficient documentation to warrant further inquiry rather than summary dismissal. Accord, Teague v. United States, 499 F.2d 1381 (7th Cir. 1974)

CONCLUSION

For the reasons hereinabove stated, this Court is respectfully requested to vacate the District Court Order dismissing Appellant's \$2255 Petition and to direct that Appellant be allowed to invoke the processes of discovery and/or that he be allowed a hearing on his said Petition.

Respectfully submitted,



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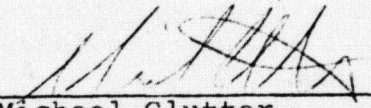
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AFFIDAVIT OF SERVICE

After being duly sworn according to the law, the undersigned MICHAEL CLUTTER states that he deposited in the United States mail two copies of the foregoing Brief contained in a securely enclosed postpaid envelope, addressed and directed to the person hereinafter named at the place and address stated below, on September 6, 1977:

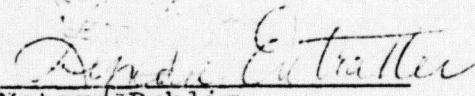
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September 6, 1977.



Michael Clutter
Counsel to Appellant

Subscribed to and sworn
before me this 6th day
of September, 1977.



Notary Public

Notary Public, Georgia State at Large
My Commission Expires Feb. 3, 1980